VIEWS AND OPINION

OF

WILLIAM WHEELER HUBBELL,

OF THE

PHILADELPHIA BAR,

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Legal Tender Act of Congress

OF 1862.

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The financial basis on which the loyal people of the North proceeded in support of the vital principle of *national defence for national existence*, and which warranted the issue of the legal tender notes by the Congress of the United States, manifestly comes under the express general powers which Congress possesses, under Section VIII of the Constitution.

1. To *lay and collect taxes, duties, imposts and excises, to pay the debts*, and *provide* for the *common defence* and *general welfare* of the *United States.*

12. To raise and *support* armies, but no appropriation of *money* to that use shall be for a longer term than two years.

13. To provide *and maintain* a Navy.

18. To make *all laws* which shall be *necessary* and *proper* for *carrying into execution* the *foregoing powers*, and *all other powers* vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Under these express general and special powers, Congress in its discretion as the supreme law-maker, deemed it necessary

to issue these notes: And the people, with reserved rights, immediately control Congress in this and all other respects by their elective franchise, sending such members as will carry into effect their views under the special and general powers contained in the Constitution. The discretion of Congress is therefore under the immediate control of the people. This discretion as to the *necessity* and *propriety* within certain limits, that is within the general and special powers, is a legislative matter, and not a judicial matter. It comes directly from the people, to be exercised for them by Congress. The *existence* of the power is however a judicial question.

In the late case from Kentucky, as it came before the Court, there appears to have been a contract of some kind, not stated in the opinion, between original parties, in relation to which a promissory note had been given. No acceptances or concessions had been made on either side, and they appear to have acquiesced in their meaning or intent as to the original contract, whatever it was, that they intended to make it on a specie basis, although they did not so express it when they had the opportunity, in making the contract; and having made this contract, one would not afterwards receive legal tenders in payment of a promissory note, which had been given directly or indirectly in some way or with some intent, in relation to this prior contract.

The Court says in the opinion, that it must take the record before it as it appears. Now these parties to this suit made up this record for their own purposes, and if they chose to admit in their record or arguments that they intended a gold or silver coin basis as the exclusive meaning of it, that cannot control strangers as to the meaning and intent of their contracts.

I take it to be a sound rule of law to lay down, that where parties to a contract having the power, do at the time specify distinctly that they mean a "gold and silver coin" basis, as was the practice in old deeds of covenant, they meant to adhere to that basis, and that it was specifically binding between them, and legislative power cannot alter the terms of their contract.

But where they have the power, and omit to state specifically that it is on a gold and silver basis, they do not intend that it necessarily shall be on such basis, and a Court has no right to step in and help one side as against the other, by construing into the contract, as an essential part of it, that which the parties themselves omitted from it when they had the power to insert it.

Such a contract, thus left open by the parties, should be construed to be made in subservience to the supreme legislative power of Congress as to lawful money. And whatever might be lawful money at the time the principal or interest was lawfully demanded, was intended by the parties as the medium or money in which it was to be paid.

It is a well settled principle of law, that contracts in relation to subjects of legislative jurisdiction, when not specific as to those subjects, are subservient to the legislative power with regard to them.

Com. of Penna. *vs.* Fayette County Rail Road Co., 5 Pa. State Reports, P. F. Smith, 452; Charles River Bridge *vs.* Warren Bridge, 11 Pet., 420; Brewster *vs.* Hough, 10 N. H. R., 138; Providence Bank *vs.* Billings, 4 Pet., 514; West River Bridge *vs.* Dix, 6 How., 507; Richmond Rail Road Co. *vs.* Louisa Rail Road Co., 13 Id., 71; Gossler *vs.* Georgetown, 6 Wheat., 596—598; East Hartford *vs.* Hartford Bridge Co., 10 How., 535; McLane *vs.* United States, 6 Pet., 404; Yeaton *vs.* United States, 5 Cranch, 281; United States *vs.* Morris. 10 Wheat., 246; 2 Russ. and M., 35; Phalen *vs.* Virginia, 8 How., 163; Balt. and Susq. Rail Road *vs.* Nesbit, 10 Id., 395; United States *vs.* Hodge, 3 Id., 534; Watson *vs.* Mercer, 8 Pet., 88; 2 Sanf. S. C. R., 355; Oliver Lee & Co. *vs.* Bank, New York Court of Appeals, 7 Smith, 9; Reciprocity Bank, 8 Id., 9.

Whether Congress, as a war measure, has a right in its discretion to issue legal tender notes founded upon the obligation of the United States, expressed on their face "to pay them," is the

great question, and I think does not admit of any sound adverse argument in view of the purposes and powers of the United States Government, as created by the Constitution, if the government be considered supreme and self-sustaining. I think that:

First. The right of self-protection in the United States Government is incidental to its existence, and it comprehends all powers as existing in Congress, in its discretion necessary to this end. Its existence cannot be made to depend upon the will of others in granting or in loaning money, or material of war.

Second. The clause of the Constitution authorizing the *support* of armies, contemplates on its face that "*money*" is an essential element for this purpose. Indeed all nations recognize that *men, money, and material* are the sinews of war.

Now, what is "money?" It is simply a medium of exchange recognized or authorized by law, or established by the legislative power, for the purchase of commodities or payment of debts. No particular kind of metal or of material is necessary. Iron, copper, nickel, all the metals, as well as gold and silver, have been used. But there are certain essential conditions necessary to constitute money. These are chiefly two. First. It must bear the impress of its issue by the sovereign authority. Second. It must either possess intrinsic value, or it must bear the obligation of the sovereign power to pay it, which sovereign power must possess the power to pay it, by virtue of its right of taxation, and wherever its jurisdiction or right of taxation extends to provide for its payment, there it may make it a legal tender, because of such right, and because of its general sovereign powers, as contained in the sections of the Constitution I have before quoted, within its territorial limits.

In 1863, I wrote on this subject, and proposed an amendment to the Constitution as a *peace* measure, not for a moment doubting its legality as a *war* power, for temporary purposes. As such peace measure I then proposed and wrote as follows, and as the

true status of *coin* and of legal tender notes are there set out, I will repeat it substantially now. Proposed amendment:

"ARTICLE 16. Congress may authorize the issue of bills of credit, and make the same a legal tender in payment of debts, public and private; but such issue shall not exceed the rate of twenty dollars for each inhabitant of the United States."

The proposed Article 16, as an amendment on the subject of the currency, is intended to give express constitutional effect to essentially *the same system of legal tender or lawful paper currency as now established*, but limited within such amount as will, in all reasonable probability, suffice to conduct the business operations throughout the vast extent of territory embraced within the limits of the United States, and supply the Government even in times of war. The advantage of an uniform currency, readily portable in its character, and of equal value in all places within the United States, cannot for a moment be reasonably doubted. The producer of grain in the far west should receive for the fruit of his labor, a currency which he can readily carry, and purchase his commodities in the east or south without being subject to onerous discounts or expenses, which always detract directly from his well-earned profits on his grain or other produce. A portable currency is necessary for such a widely extended country as the United States, and there is no power or authority to create such a currency except it be placed in the United States or General Government.

The States are prohibited from issuing bills of credit, as well as from coining money. That the United States is at present authorized to issue bills of credit, or paper, except as "securities" in evidence of money borrowed, is, to say the least, as a peace or commercial measure, exceedingly questionable. Whether legal tender notes convertible into bonds or securities for money borrowed, are really within the meaning of the Constitution, admits of a doubt, although they are certainly a very appropriate device for the present *relief of the Government in time of war*.

My understanding of the Constitution at present, as to issues of paper and currency is, that the United States may borrow money and issue bonds or "securities" as evidences of debt for the money borrowed, and that the Government may coin money, and that coin or money is "currency." The legal tender note of paper is a modern invention, never before known, in fact, as a borrowing of money, nor as a security for money borrowed. It certainly is not "coin." Coin is a metal possessing intrinsic value, impressed with the insignia of the Government to make it currency, though the legal tender note is in fact "money."

While the States are prohibited from issuing bills of credit, it will be recollected that this is a *restriction* only on the original sovereign right of the States, or on the people to authorize the States respectively to issue such bills. But that restriction on the States or people does not confer the right to issue bills of credit on the United States. All its powers are delegated, and if not delegated in the Federal Constitution, either expressly or *by fair implication to carry some express power into effect not otherwise provided for*, it does not possess them; but they are reserved to the States or the people, unless prohibited, and if prohibited to the States, they may still, by amendment, be expressly conferred on the United States.

As the growth of the country is and will be rapid, and the existence of the debt to be represented by five hundred millions, or a less number of legal tender, or notes of currency, is now incurred, it would not be improper to expressly give a constitutional power to establish such a currency *as a peace measure* for the general civil business purposes of the country. *The exigencies of war no doubt justified their issue as a temporary measure to "raise and support the army," "and provide and maintain the navy."*

In a country of small area, coin might answer every civil purpose, but in this country, without a more portable currency, the expense of transporting coin, or the rates of exchange, often

absorb the profits of labor and cripple the advancement of industrial pursuits.

It is against public policy to embarrass or absorb the fruits of labor with exchanges or unproductive expenses or charges. They too often make labor the slave of capital.

An uniform portable currency tends to relieve labor of this consuming difficulty, and to make it free to enjoy the full fruits it shall yield.

As to the relative value of coin, and legal tender notes constitutionally issued for civil purposes. The coin is alloyed and given a fictitious value not redeemable in anything, but capable only of having a certain amount of gold or silver extracted from it; whilst the legal tender note of the nation secured by the right of taxation, is represented by all the material wealth of the nation, real and personal estate of every kind, including both the gold and the silver, and all the other precious commodities. It is as enduring as the nation itself; and its issue and possession by citizens, is a pecuniary inducement or ground amongst other material reasons, for upholding and perpetuating the Government. Hence the propriety of such a clause as the Article 16, to be expressly set forth in the Constitution."

Private property cannot be taken for public use without just compensation, under the Constitution, and this clause itself contemplates that the Government possesses within itself the inherent, or self-dependent power of making just compensation at the time of taking the property, by payment in legal tender notes, or coin—" Money."

The war powers of the United States Government, are illimitable, and necessarily should be so to be on an equal footing with other nations, except in one particular restricted by the Constitution=That no appropriation of money shall be for a longer period than two years. And as such a Government possessing such a power, the loyal Northern States accepted the legal tender issue, and made their contracts and carried on business under it, without exception or reservation.

Real estate, subject to mortgages, due and payable before the year 1862 (before the act), has since been extensively sold, and in the valuation, the amount of the mortgage was computed in legal tender notes (not in gold at a premium), the difference in the purchase-money paid in legal tender notes, and the holders of the mortgages have acquiesced and received their interest in legal tender notes, without demand of the principal, but in implied renewal of it to run from year to year. To make these bonds and mortgages now payable in gold at a premium, would be making the obligor in the bond liable, without his consent to pay, say the heaviest premium, if the property did not satisfy it. And would be making the purchaser of the property pay a premium in addition to his purchase-money, or to pay twice for the property.

Holders of bonds of corporations have sold and others have bought them on a legal tender basis. To change this, would make a legal fraud between the parties through confidence in an Act of Congress necessary to save the life of the nation.

Stocks of corporations have been bought and sold subject to payment of mortgage interest. Freights and values of goods have all been adjusted to pay these on a legal tender basis. If this is to be altered to a gold basis at a premium, it unsettles all the values and earnings on which business has been established. This is all unjust to the people who have been engaged in these business transactions.

The conclusions to which this line of argument leads are inevitable: They are

1. That the legal tender promise to pay of the United States issued as a war measure, is constitutional, because it is "money" within the express war power of the Constitution, is essential to self-preservation, and self-defence is the first law and right of nations, as well as of persons. And the fact that it is accompanied by a power of taxation under the Constitution to pay the debts of the United States, is a capacity and power of redemption, giving a full standard value within the jurisdiction of the United States.

2. That the coin of the United States containing an alloy, is not in fact a full standard of value, because it is not accompanied by any promise of redemption, but is simply of about nine-tenths of the intrinsic value as compared with its nominal value. And the legal tender note, therefore, simply *as a domestic* medium of exchange is the most valuable species of money.

3. Gold has been at a premium only because its intrinsic value made it a medium of exchange with foreign nations, taking it out of the country. There being, in fact, much more in, and produced in the country than necessary to pay import duties. The payment of interest in gold was evidently to induce foreigners to buy the bonds in Europe, not to create differences in domestic valuation in relation to legal tender notes within the United States jurisdiction.

4. That there is no general *peace power* in the Constitution which involves the principle of self-preservation, and expressly recognizes "money" as an essential element in its exercise; and as a peace or commercial measure, therefore, the issue of legal tender notes is not authorized by the Constitution.

5. That having been lawfully issued as a war measure in self-preservation, the Government can replenish them as mutilated by use; and under its general powers of taxation, payment of debts and power to borrow money, can pay off or fund them at its convenience. But that Congress has no power to authorize additional or greater issues of them as a peace or commercial measure.

6. That specific contracts between parties to pay in gold or silver coin, cannot be disturbed by subsequent legislative enactment, with the substitution of legal tender notes for payment.

7. That parties to contracts, for the future payment of lawful money, failing to covenant for the payment of gold and silver coin, when they could have done so in terms, waive the same as an essential condition, and that it is not sound law to constructively force a gold and silver specialty into their con-

tracts, and that an Act of Congress is consequently unconstitutional, when the parties themselves omitted to make any such special contract.

And that parties thus contracting are justly to be construed as taking the risks and chances and fluctuations of trade and business, and the condition of the country; and virtually agree to abide by the supreme legislative power of Congress as to what is a lawful money tender, when the debt arising under the contract is lawfully *demanded to be paid.* And if allowed to run overdue and undemanded, it is an agreement to abide by such legal tender money as may exist *when it is so demanded.*

8. That in time of war, the "necessity and propriety" of any measure, under the Constitution to carry on the war, rests entirely with the Congress of the United States, which is the war making and the war conducting power. But, nevertheless, the question as to whether the Congress has the right to issue legal tender notes in time of war, under the general and special powers conferred upon that body by the Constitution, is purely a judicial question, and its final determination does rest with the Supreme Court of the United States.

WM. WHEELER HUBBELL.

Philadelphia, April 4, 1870.